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IN THE

Supreme Court of the United States

October Term 1962

No. 466

DANIELS & KENNEDY, INC.,
Petitioner,

against

A/S INGER and ILLINOIS ATLANTIC CORP.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT ILLINOIS ATLANTIC CORP. IN OPPOSITION

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Opinions Below

The opinion of the United States District Court for the Eastern District of New York (Pet. App.* 1a-26a) is officially reported at 194 F. Supp. 398. The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 27a-34a) has not yet been reported, and its decisions on the petitions for rehearing and for rehearing *en banc* (Pet. App. 35a-37a) are not reported.

* Pet. App. refers to petitioner's appendix to its petition for a writ of certiorari.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

The only reference to respondent Illinois Atlantic Corp. which can be culled from almost four pages of the petition covering the "Questions Presented for Review" is to be found in sub-paragraph 9 of the first question.

We do not believe that any of the matters relating to the position of respondent Illinois Atlantic Corp. in this litigation merit the consideration of this Court.

Respondent Illinois Atlantic Corp. does not take any position with respect to the questions presented by petitioner as they relate to respondent A/S Inger.

Statement

This petition arises from an action brought in the United States District Court for the Eastern District of New York, with jury trial demanded, by Frank Drago, as plaintiff, to recover damages from A/S Inger for injuries alleged to have been sustained by plaintiff while working as a longshoreman aboard a vessel owned by A/S Inger, while in the employ of Daniels & Kennedy, Inc., the stevedore engaged in the discharge of a cargo of paper from that vessel.

A/S Inger, as third-party plaintiff, served amended third-party complaints upon both Daniels & Kennedy, Inc. and Illinois Atlantic Corp., naming them as third-party defendants. Illinois Atlantic Corp. was the time-charterer of s/s Elin Hope under a New York Produce Exchange Form

timecharter (Pet. App. C.C.A. 624a*). Both Daniels & Kennedy, Inc. and Illinois Atlantic Corp. cross-claimed against each other, seeking indemnity to the extent of their respective liabilities, if any, to A/S Inger.

Only the main action was tried to a jury, it having been stipulated that the third-party actions and the cross-claims as between the two third-party defendants were to be tried to the Court.

The jury rendered a verdict in favor of plaintiff Drago on his negligence claim, while rendering a verdict in favor of A/S Inger on the issue of unseaworthiness. In addition, the jury found plaintiff to be 75% contributorily negligent and for that reason reduced his damages from $18,000 to $4,500.

After the jury verdict had been rendered, the Court proceeded to take testimony, accept exhibits and hear argument on the amended third-party complaint of A/S Inger as against both Daniels & Kennedy, Inc. and Illinois Atlantic Corp. These hearings culminated in Judge Zavatt's memorandum opinion of May 31, 1961 (Pet. App. 1a-26a). In that opinion Judge Zavatt granted indemnity to A/S Inger together with counsel fees and expenses as against third-party defendant Daniels & Kennedy, Inc., but denied A/S Inger's indemnity claim against Illinois Atlantic Corp.

In accordance with procedures previously agreed upon, the Court then proceeded to take testimony and hear argument on the cross-claim of Daniels & Kennedy as against Illinois Atlantic Corp. Since the Court had earlier dismissed the third-party complaint of A/S Inger as against Illinois Atlantic Corp., there was no need to take testimony or conduct hearings with respect to the latter's cross-claim as against Daniels & Kennedy, Inc. That issue had by then become moot.

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* Pet. App. CCA refers to petitioner Daniels & Kennedy, Inc.'s appendix as filed in the United States Court of Appeals for the Second Circuit.

The hearing on Daniels & Kennedy, Inc.'s cross-claim resulted in its dismissal, as encompassed in the final judgment, dated June 12, 1961 (Pet. App. C.C.A. 31a).

Multiple appeals were taken from the initial judgment entered following the jury verdict and from the final judgment of June 12, 1961. The only appeals, however, which were pressed before the United States Court of Appeals for the Second Circuit were as follows:

1. Daniels & Kennedy, Inc. appealed the initial judgment of October 24, 1960 and the final judgment of June 12, 1961 insofar as they awarded judgment to plaintiff as against defendant A/S Inger.

2. Daniels & Kennedy, Inc. appealed from the final judgment of June 12, 1961 insofar as it granted indemnity together with counsel fees and expenses to A/S Inger as against Daniels & Kennedy, Inc.

3. Daniels & Kennedy, Inc. appealed from the final judgment of June 12, 1961 insofar as it awarded judgment in favor of Illinois Atlantic Corp. dismissing the cross-claim of Daniels & Kennedy, Inc.

It is relevant to note that A/S Inger took no appeal from the final judgment of June 12, 1961 insofar as that judgment dismissed its amended third-party complaint seeking indemnity from Illinois Atlantic Corp. At that juncture, therefore, Illinois Atlantic Corp. remained as an active litigant and appellee only by reason of the appeal by Daniels & Kennedy, Inc. from the dismissal of its cross-claim.

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 27a-34a) rejected Daniels & Kennedy, Inc.'s attack upon the basic judgment in favor

of plaintiff Frank Drago and affirmed the judgment of the District Court awarding indemnity, counsel fees and expenses to A/S Inger as against Daniels & Kennedy, Inc.

The opinion of the United States Court of Appeals, dated July 3, 1962, did not dispose of Daniels & Kennedy, Inc.'s appeal from the dismissal of its cross-claim as against Illinois Atlantic Corp., since the Court was apparently under the impression that the appeal had been dropped. A petition for rehearing was addressed to the Court asking it to rule on that phase of Daniels & Kennedy, Inc.'s appeal. This petition for rehearing resulted in an amendment to the original opinion of the Court, dated August 17, 1962 (Pet. App. 35a-36a), in which it was stated:

> "There is no substance in the appeal by Daniels & Kennedy, Inc. from the dismissal of its cross-claim against Illinois Atlantic Corp."

ARGUMENT

For the purposes of this brief in opposition we will restrict ourselves to the respective positions of petitioner Daniels & Kennedy, Inc. and respondent Illinois Atlantic Corp. We will not be concerned with the petition insofar as it refers to the granting of indemnity to respondent A/S Inger as against petitioner Daniels & Kennedy, Inc.

In an elaboration on the general finding of negligence by the jury, the Trial Court, in determining the indemnity claims of A/S Inger found that A/S Inger, the shipowner, was liable in negligence to plaintiff because a securing pin on the No. 2 starboard winch of s/s Elin Hope was missing at the time of plaintiff's injury. Nevertheless, the Trial Court allowed A/S Inger to recover indemnity from Daniels & Kennedy, Inc. on the grounds that the stevedore, having been aboard the vessel from 0800 to 1200 and again from 1300 to the time of the accident shortly thereafter, had notice that this pin was missing.

Nowhere during the course of the trial was there testimony or any proof that respondent Illinois Atlantic Corp. (the timecharterer) had any control over the ship's equipment, including the No. 2 starboard winch. As between the shipowner and the charterer, the charter is clear as to where the responsibility lay for the maintenance and upkeep of ship's equipment. Comments on this point can be found in the timecharter (Pet. App. C. C. A. 624a) as well as in Judge Zavatt's opinion of May 31, 1961 (Pet. App. 25a). Yet, respondent Daniels & Kennedy, Inc. now urges that it has a right to recover indemnity on its cross-claim from Illinois Atlantic Corp. after having had indemnity found against it in favor of respondent A/S Inger.

We submit that under the facts there is no merit to Daniels & Kennedy, Inc.'s cross-claim against respondent Illinois Atlantic Corp., that the decisions of the District Court and the Court of Appeals on the point were clearly correct, that the points of law are not the subject of any conflict of decisions in our Courts, and that no important questions of federal law are thereby raised warranting review by this Court.

The Decisions Below Are Clearly Correct

The Trial Judge was quick to see the inconsistencies in any argument which could be put forward on behalf of petitioner Daniels & Kennedy, Inc. in support of its cross-claim against respondent Illinois Atlantic Corp. If the duty of A/S Inger, as the shipowner, to inspect and maintain its own equipment did not prevent it from recovering indemnity from Daniels & Kennedy, Inc. in the first instance on a breach of warranty of workmanlike service theory, then how as a matter of logic could Daniels & Kennedy, Inc. in turn recover from the timecharterer, Illinois Atlantic Corp.?

A hearing was held on June 12, 1961 at which time counsel for third-party defendant Daniels & Kennedy, Inc. had an opportunity to present testimony, exhibits, and argument on the issue of the cross-claim (Pet. App. C. C. A. 607a-619a).

Daniels & Kennedy alleged that Illinois Atlantic "breached its undertaking as a supplier of marine equipment to provide safe and proper equipment" (Pet. App. C.C.A. 608a). Later counsel claimed that the "time charterer through the shipowner which acted as its agent in this case negligently supplied marine equipment, and, therefore, it breached its implied warranty to supply safe and proper marine equipment". The claim was made that Illinois Atlantic was an agent of the shipowner and would be liable for the breach by its principal (the shipowner) of its warranty to supply an adequately equipped No. 2 starboard winch.

Recent case authorities on the subject of indemnity have noted that a shipowner may be barred by its own conduct from enforcing a claim against a stevedore predicated upon a breach of warranty of workmanlike service. Perhaps these cases are best summarized in the language of Chief Judge Sobeloff in his opinion in *American Export Lines, Inc.* v. *Revel,* 266 F. 2d 82 (4 C. A. 1959), when he wrote at page 87:

> "We turn to a consideration of the judgments entered in the third-party actions. The Supreme Court recently indicated in Crumady v. The Joachim Hendrick Fisser, 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413, that by merely supplying defective equipment the shipowner will not necessarily be barred from recovery on his contract of indemnity. We held in Calmar Steamship Corp. v. Nacirema Operating Co., 4 Cir., 266 F. 2d 79, that a finding of negligence in supplying such equipment is not determinative of the shipowner's right to indemnity. His action is in contract and recovery depends upon whether his conduct has been such as to bar enforcement of the

gent in regard to the longshoreman. Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 1958, 355 U. S. 563, 78 S. Ct. 438, 2 L. Ed. 2d 491."

Our Courts contemplate that in a given situation the conduct of the shipowner may be such that it will not be permitted to enforce a claim for breach of warranty against the stevedore.

It is apparent that the Trial Court did not believe that the conduct of the shipowner in this case in supplying a winch without a locking pin was sufficient to bar its indemnity claim. How can we then logically say that the stevedore, which had been found guilty of a breach of warranty of workmanlike service, could recover indemnity from an "agent" for the shipowner on the very same theory which was insufficient to bar the shipowner from recovering initially against the stevedore?

The Trial Court quickly grasped the problem and stated (Pet. App. C.C.A. 611a):

> "The Court: Let me ask you this, are you in the same position in your cross-claim against the charterer as you are in resisting the claim of the shipowner?
>
> What's the difference?
>
> Mr. Green: I think your Honor has pinpointed it."

The colloquy immediately following points up even more clearly that counsel for Daniels & Kennedy, Inc. argues that if Illinois Atlantic was in any sense guilty of breach of contract it was because of the shipowner's fault.

Later in the colloquy (Pet. App. C.C.A. 613a) the Court commented upon the fact that it had already found that the shipowner was entitled to recover indemnity from the stevedore and stated further:

> "The Court: Now, how does the rationale of this opinion change because, instead of your having a

counter-claim against the ship owner, you assert a claim over against the charterer?

Mr. Green: To be frank with you, if we carry your opinion out to its logical conclusion, your Honor should dismiss my cross-complaint against the charterer. * * * "

Later in the colloquy there was discussion between the Trial Judge and counsel for Daniels & Kennedy on the Court's opinion granting shipowner indemnity (Pet. App. C.C.A. 616a):

"The Court: No. You can't like it, and I want you to frankly say so; but if the Court was correct in its holding as to the claim of the shipowner, the Court, to be consistent, could not grant your cross-claim against the charterer; is that right?

Mr. Green: I think your Honor is absolutely correct on that.

The Court: Right, and to grant your cross-claim against the charterer in the light of this opinion would be an absurd inconsistency; would it not?

Mr. Green: Yes, Judge."

The Court commented as follows at the close of the hearing on the issue of the cross-claim (Pet. App. C.C.A. 618a):

"The Court: How can the charterer be in a worse position than the owner?"

We submit that the answer to that rhetorical question is that under the facts of this case Illinois Atlantic Corp., the timecharterer, cannot be in a worse position than the shipowner. To permit the shipowner to recover indemnity from the stevedore in the first instance and then to follow up with a decision that the stevedore can then recover indemnity on its cross-claim against the timecharterer leads to legal and factual absurdities.

It would be absurd to impose upon Illinois Atlantic Corp. an obligation with respect to a failure of ship's

equipment even greater than that which was imposed upon the shipowner.

We respectfully submit that the Trial Judge was correct in dismissing the cross-claim of Daniels & Kennedy, Inc. as against Illinois Atlantic Corp.

The United States Court of Appeals for the Second Circuit was similarly unimpressed with the argument put forward by Daniels & Kennedy, Inc. in support of its cross-claim, stating that there was "no substance" to it.

There was no contract between Illinois Atlantic Corp. and Daniels & Kennedy, Inc. No stretch of the imagination could put Illinois Atlantic Corp. in the position of a supplier of marine equipment vis-a-vis the stevedore, Daniels & Kennedy, Inc. Daniels & Kennedy, Inc. was hired by the News Syndicate Co., Inc., the publisher of the New York Daily News, and not by any of the parties to the action. Illinois Atlantic Corp. was only one of a chain of charterers, sub-charterers and shippers in an operation involving the shipment of paper from Baie Comeau, Quebec to New York. Nor is there any support in the record for any claim that Illinois Atlantic Corp. was an agent for the shipowner insofar as the stevedoring operations were concerned.

There Is No Conflict of Decision

Petitioner, Daniels & Kennedy, Inc., has not urged that the decisions of the courts below on the issue of its cross-claim against Illinois Atlantic Corp. are in conflict with any decisions of this Court, of the United States Courts of Appeals or the highest Courts of any of our 50 States.

There Is No Important Question of Federal Law Presented and the Issues on Daniels & Kennedy, Inc.'s Cross-Claim Against Illinois Atlantic Corp. Do Not Warrant Review by This Court

Daniels & Kennedy, Inc. has not claimed in its petition that the disposition of its cross-claim against Illinois Atlantic Corp. both in the United States District Court for the Eastern District of New York and in the United States Court of Appeals for the Second Circuit does violence to any important federal question. As a matter of fact, the issue of the cross-claim is so completely minor that it becomes totally submerged in the issues revolving around the recovery of indemnity by A/S Inger, the shipowner, against Daniels & Kennedy, Inc., the stevedore.

Assuming for the moment the correctness of the courts below in permitting A/S Inger to recover indemnity from Daniels & Kennedy, Inc., then to permit Daniels & Kennedy, Inc. to recover on its cross-claim against Illinois Atlantic Corp. would be to impose upon the latter, as time-charterer, an obligation with respect to a failure of the vessel's equipment greater than that which was imposed upon the shipowner in the first instance. As pointed out earlier in this brief, we believe that the absurdity of such a proposition is patent.

On the other hand, assuming that the courts below were in error in granting indemnity to A/S Inger as against Daniels & Kennedy, Inc., then the latter's cross-claim against Illinois Atlantic Corp. becomes moot. Daniels & Kennedy, Inc.'s cross-claim against Illinois Atlantic Corp. has reason for existence only in the event of Daniels & Kennedy, Inc.'s liability.

Should this Court, for any reason, choose to grant Daniels & Kennedy, Inc.'s petition, such a grant should be limited to the issues as between Daniels & Kennedy, Inc. and A/S Inger. For the reasons noted above, the issues

raised by Daniels & Kennedy, Inc.'s contingent cross-claim against Illinois Atlantic Corp. do not warrant the attention of this Court under any circumstances. The cross-claim cannot be supported in the event Daniels & Kennedy, Inc. is liable. The cross-claim becomes moot in the event Daniels & Kennedy, Inc. is not liable.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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